ISSUED MARCH 25, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DAHN, INC. dba Casa de Liquor 18432-A Yorba Linda Boulevard Yorba Linda, CA 92686 Licensee/Appellant, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6549 & 6549m File: 21-258241 Reg: 95031989 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: February 8, 1995 Los Angeles, CA

Dahn, Inc., doing business as Casa de Liquor (appellant), appealed from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellant's off-sale general license for 20 days for appellant's clerk having sold an alcoholic beverage to a person under the age 21 years, a violation of Business and Professions Code §25658(a).

Appearances on appeal included LaRue Harcourt, secretary of Dahn, Inc., the corporate appellant; and Jonathon E. Logan, counsel for the department.

FACTS AND PROCEDURAL HISTORY

[1]The decision of the department dated July 13, 1995 is set forth in the appendix.

Appellant's off-sale general license was issued January 29, 1990.

Thereafter, the department instituted an accusation against appellant on December 30, 1994. An administrative hearing was scheduled for May 11, 1995, at which time oral and documentary evidence was received. At the hearing it was determined that appellant's clerk had sold an alcoholic beverage to a person under 21 years of age in a "decoy" operation conducted by the City of Brea Police Department.

Subsequent to the hearing, the department issued its decision which was adverse to appellant. Appellant filed a timely notice of appeal.

In its appeal, appellant raised the following issues: (1) the Office of Administrative Hearings' letter dated April 21, 1995 caused appellant's representatives to unintentionally miss the scheduled administrative hearing, and (2) the "decoy" operation conducted by the City of Brea Police Department was an illegal "sting" operation.

Thereafter, on December 26, 1995, the department filed a motion to dismiss the appeal on the ground that appellant had not paid the remaining costs of the record on appeal. Apparently, appellant paid the estimated charges in the sum of $98.80, but after the record was finally completed, the final charge was $134.45, thereby leaving a balance due of $35.65.

DISCUSSION

I

Appellant contended that it received a notice dated April 21, 1995 from the Office of Administrative Hearings (OAH), which changed the location of the hearing from

Santa Ana to Los Angeles. Appellant argued that its representatives relied on that notice and appeared in Los Angeles, thus missing the hearing in Santa Ana.

On March 31, 1995, the department notified appellant of a hearing set for April 19, 1995, to be held in Santa Ana. For some reason that hearing was continued to May 3, 1995 with notice sent by the department to appellant showing Santa Ana as the place of the hearing. Again the hearing was re-set for May 11, 1995, in Santa Ana, and the notice by the department to appellant was sent on April 24, 1995, showing Santa Ana as the hearing place.

The record indicates that on the date of the hearing, an employee of OAH called from Los Angeles approximately five minutes after 9:00 a.m. (the scheduled hearing time was 9 a.m.) advising the administrative law judge (ALJ) who was presiding over the Santa Ana administrative hearing, that appellant's representatives were in Los Angeles in error but were leaving for Santa Ana [R.T. 4, 5]. The ALJ waited one hour and forty-five minutes before he proceeded with the hearing [R.T. 5]. The hearing was concluded before appellant's representatives arrived in Santa Ana at about 11:05 a.m.

The letter of April 21 from OAH certainly created some confusion in the minds of appellant's representatives. However, the department's notice marked "corrected" which was dated April 24 should have focused appellant's representatives on the Santa Ana area as the site of the hearing.

We determine that the ALJ was reasonable in his calling the matter for hearing after waiting one hour and forty-five minutes for appellant's representatives to arrive from Los Angeles, and appellant representatives were unreasonable in relying on the

OAH letter to the exclusion of the later department's notice.

II

Appellant contended that the "decoy" operation conducted by the Brea City Police Department amounted to an illegal "sting" operation.

The recent Supreme Court case of Provigo Corporation v. Alcoholic Beverage control Appeals Board (1994) 7 Cal.4th 561, 28 Cal.Rptr.2d 638, found that the use of decoy "sting" operations under police control was constitutional. The Supreme Court cited the case of Reyes v. Municipal Court (1981) 117 Cal.App3d 771, 777, 173 Cal.Rptr. 48, for the proposition that "...ruses, stings, and decoys are permissible stratagems...and they become invalid only when badgering or importuning takes place to an extent and degree that is likely to induce an otherwise law abiding person to commit a crime."

Chad Meyer (the purchasing minor) was a 19 year old at the time of the violation. He was given $5 by the police with serial numbers recorded. He then entered the premises and purchase a bottle of Miller Genuine Draft. Meyer had been instructed to produce his regular driver's license if asked about his age, and not to lie. [R.T. 10, 19-21] Meyer was equipped with a body mike. [R.T. 12-13]. The clerk during the sale, did not ask any questions of the minor or make any statements. [R.T. 20].

Randy Smeal, a police officer with the City of Brea, testified that the decoy appeared to be under the age of 21 years [R.T. 10]

The responsibility is upon the licensee not to sell alcoholic beverages to a minor

(Munro v. Alcoholic Beverage Control Appeals Board & Moss (1957) 154 Cal.App.2d 326, 316 P.2d 401; and Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626, 301 P.2d 474. Before a sale is made of an alcoholic beverage, it is the responsibility of the seller to determine the true age of the customer who is offering to purchase the alcoholic beverage (Business and Professions Code §25658(a)).

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law (Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172, 17 Cal.Rptr. 315, 320; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504, 22 Cal.Rptr. 405, 411; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149, 2 Cal.Rptr. 629, 633.

III

The department filed a motion to dismiss the appeal on the grounds that appellant had failed to pay the full costs of the record on appeal including the cost of the preparation of the transcript. The appeals board advised appellant on January 2, 1996 that the department had filed a motion to dismiss his appeal. Appellant was given 15 days in which to file a responsive pleading, which appellant failed to file. On January 29, 1996, the appeals board again advised appellant of the motion by the department but allowed the issue of the motion to be argued at the February 8, 1996 oral arguments before the board. Appellant either through counsel or any representative, failed to appear at the board's oral argument hearing.

CONCLUSION

The motion of the department to dismiss the appeal is granted. The appeal is dismissed.[2]

RAY T. BLAIR, JR.,CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL

APPEALS BOARD

[2]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.